U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 August 2003

BALCA Case No. 2002-INA-257
ETA Case No. P2001-NY-02475318

In the Matter of:

LAW OFFICES OF MUNAWAR H. SANDHU,
Employer,

on behalf of

IRAM ZAFAR,
Alien.

Certifying Officer: Dolores Dehaan
New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM.. This case arose from an application for labor certification on behalf of Iram Zafar ("Alien") filed by the Law Offices of Munawar H. Sandhu ("Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On March 2, 2001, Employer filed an application for labor certification on behalf of the Alien for the position of Paralegal. (AF 7-8).

On April 6, 2002, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the ground that Employer unlawfully rejected applicants Sharon McRae, Eric E. Bennet, Leroy Gibson, Jose Narvaez, Elisa Voyd, Sanders Medez, Gene Gallo, Robert G. Stopper and Peter Arnau. The CO found that all nine U.S. applicants were qualified for the position, as they all satisfied Employer's minimum requirements for the occupation of Paralegal. The CO advised Employer that in his Rebuttal he had to document lawful, job related reasons for rejecting each of the candidates. The CO noted that in Employer's recruitment report Employer stated that he rejected some of the applicants for lack of experience in immigration law, an undisclosed requirement. The CO told Employer that rejection of the applicants for unstated requirements was unlawful. Additionally, Employer did not document that he contacted the applicants in a timely manner. Employer also did not document that he made sufficient good faith efforts in contacting the U.S. workers. The CO instructed Employer to document his recruitment efforts. (AF 69-71).

In his Rebuttal dated April 29, 2002, Employer indicated that he wanted to amend the labor application to reflect the requirement of experience in immigration law, as he limited his practice to immigration law. (AF 72).

On June 1, 2002, the CO issued a Final Determination (FD) denying certification. (AF 74-75). The CO found that Employer in his Rebuttal did not demonstrate that the rejection of the nine candidates the CO found qualified was for lawful and job related reasons. The CO also found that Employer unlawfully rejected qualified U.S. applicants for failing to meet undisclosed requirements. Further, the CO noted that Employer failed to submit documentation on his recruitment efforts, as required in the NOF. The CO

added that Employer's suggestion of amending the labor certification application did not remedy the deficiency and was not an option provided to Employer.

On June 17, 2002, Employer filed his Request for Review, titled Memorandum in Support of Review Petition. (AF 76). Employer stated that the CO did not exercise her discretionary powers properly because she did not remand the case to the state agency so Employer could readvertise. Employer added that since he was the employer he knew the requirements of the job and not the CO.

The record does not reflect that a brief was filed.

DISCUSSION

A U.S. job applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991).[1]

The minimum requirement for the position, in accordance with the ETA 750 and job advertisement, is two years of experience as a Paralegal. All of the nine candidates noted by the CO have experience as Paralegals, and all of the candidates, with the exception of two, exceed the minimum experience requirements.[2] We will review the credentials of applicant Sharon McRae to reach our decision.

[1] The CO in the NOF found nine candidates to be qualified for the position of Paralegal who were apparently unlawfully rejected. The CO advised Employer that in his rebuttal he had to document the lawful, job related reasons for the rejection of each of the applicants to demonstrate his good faith efforts in recruitment. Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Reliable Mortgage Consultants*, 1992-INA-321 (Aug. 4, 1993). Under 20 C.F.R. §656.24, the rebuttal following the NOF is the employer's last chance to make his case. Thus, it is an employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Employer's sole attempt to cure the deficiency was to suggest the amendment of the labor application and to suggest that the case be remanded to the state agency. Denial of certification has been affirmed where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Accordingly, Employer's failure to address the deficiency is, without more, grounds for denial of certification.

[2] Applicants Bennett and Gallo only met the minimum requirements as both have two years of experience as Paralegals.

Ms. Sharon McRae has three years experience as a Legal Assistant and six years as a Paralegal. (AF 56-57) Since Employer's minimum experience requirement is two years as a Paralegal, Ms. McRae exceeds Employer's minimum experience requirement as stated in the ETA 750A. Therefore, we agree with the CO in finding Ms. McRae qualified for the position.[3]

Employer in its Recruitment Report (AF 63-65) rejected Ms. McRae because she had no immigration law experience. Given that neither the ETA 750 nor the job advertisement indicate immigration law experience as a requirement, that undisclosed requirement cannot be used by Employer to reject an otherwise qualified candidate. It is unlawful for an employer to reject U.S. workers for lack of particular courses or additional training or experience not specifically identified on the ETA 750 as job requirements. *SRS Network, Inc.*, 1990-INA-405 (Sep. 5, 1990); *Quantem Corp.*, 1989-INA-174 (Feb. 21, 1990).

ETA 750A, box 15, titled "Other Special Requirements," was created to afford employers the opportunity to list their particular requirements. The listing permits requirements to be evaluated by the state agency, and potential applicants to be forewarned that such requirements exist. It was in box 15 that Employer had to indicate the need for experience in immigration law; however Employer listed no additional requirements.[4] Moreover, in *Ronald J. O'Mara*, 1996-INA-113 (BALCA Dec. 11, 1997)(*en banc*), the Board held *en banc* that a remand is justified where an employer who is unsuccessful in convincing the CO that the requirement is justified by business necessity also unequivocally offered to readvertise the position, this rule does not apply where there were unstated job requirements.

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[3] We also concur with the CO's finding that the other eight applicants were qualified for the position as they all meet or exceed Employer's minimum requirements of two years experience as a Paralegal.

[4] We note that even in the amended labor certification application (AF 82) submitted for the case to be remanded to the state agency Employer left box 15 blank.

In his Request for Review, Employer argues that his legal practice is limited to immigration law. Presumably, Employer implies that the immigration law experience was an unstated but obvious requirement. While an employer may contemplate that certain duties specified in his job description may require certain education and/or experience, these requirements must be specified by the employer. Rejection of U.S. workers for not meeting unspecified requirements constitutes unlawful rejection of qualified U.S. workers pursuant to 20 C.F.R. § 656.21(b)(7). *Photo Network*, 1989-INA-168 (Feb. 7, 1990); *Musicrafts International*, 1988-INA-461 (Jan. 10, 1990); *Universal Energy Systems, Inc*., 1988-INA-5 (Jan. 4, 1989).

Additionally, in *Morrison Express Corp.*, 1991-INA-77 (Apr. 30, 1992) we found there was no evidence that the job offered was so complex that a competent accountant could not be taught the nuances with a minimal amount of orientation training. Similarly, in the instant case, even if Employer had disclosed the requirement of experience in immigration law, this panel may have concluded, like in *Morrison Express,* that a candidate like Ms. McRae with three years experience as a Legal Assistant and six years experience as a Paralegal could perform the job of Immigration Law-Paralegal with minimum orientation. However, the fact remains that the requirement of experience with immigration law was an undisclosed requirement, and as such could not be used to reject a qualified US worker.

Furthermore, Employer's rejection of the job applicant is unlawful where it fails to provide an objective detailed basis for concluding that the U.S. job applicant cannot perform the main job duties. *Impell Corp.*, 1988 INA 298 (May 31, 1988)(*en banc*). The employer's burden of proof requires a convincing showing that the U.S. job applicant could not perform the job in an acceptable manner, as contemplated by 20 CFR § 656.24(b)(2)(ii). *Fritz's Garage*, 1988-INA-98 (Aug. 17, 1988)(*en banc*). As Ms. McRae's resume supports the CO's finding that she met the stated job requirements, Employer was required to submit convincing documentation that Ms. McRae was unable to perform the stated job duties. *Future Furniture, Inc.*, 1989-INA-17 (Oct. 30, 1989).

Employer did not submit a single piece of documentation demonstrating that Ms McRae was unable to perform the job in an acceptable manner. Employer limited his argument to stating that Ms. McRae, along with the rest of the candidates, lacked experience in immigration law. The Employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Employer in this case failed to meet his dual burden. [5]

Another ground for affirming the CO's denial is Employer's failure to document his recruitment efforts. Since Employer is seeking the benefit of a special provision of the Immigration and Nationality Act under which an alien is to be certified to fill a job for which U.S. workers have applied, it is his responsibility to recruit in good faith and to document his efforts. Employer was requested by the CO in the NOF to document his recruitment efforts. Employer in his rebuttal did not submit any evidence documenting his recruitment efforts. If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*).

As the record is sufficient to support the CO's denial of alien labor certification and for the above stated reasons, the following order will issue:

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

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Todd R. Smyth
Secretary to the
Board of Alien Labor Certification Appeals

[5] Although the discussion in this decision focuses on the qualifications of a single candidate, the decision is equally applicable to the other candidates we found to be qualified for the position.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.